

The Gazette



of India

EXTRAORDINARY

PART II—Section 3

PUBLISHED BY AUTHORITY

No. 143]

NEW DELHI, SATURDAY, JUNE 6, 1953

ELECTION COMMISSION, INDIA

NOTIFICATION

New Delhi, the 25th May 1953

S.R.O. 1067.—WHEREAS the election of Shri Brijlal Nandlal Biyani, as a member of the Legislative Assembly of the State of Madhya Pradesh from the Akola constituency of that Assembly, has been called in question by an Election Petition duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951), by Shri Bhikaji Keshav Joshi of Ward No. 1, Akola and Shri Mukund Vinayak Dhamankar of Ward No. 1, Akola;

AND WHEREAS, the Election Tribunal appointed by the Election Commission, in pursuance of the provisions of Section 86 of the said Act, for the trial of the said Election Petition has, in pursuance of the provisions contained in section 103 of the said Act, sent a copy of its Order to the Commission;

NOW, THEREFORE, in pursuance of the provisions of Section 106 of the said Act, the Election Commission hereby publishes the said Order of the Tribunal.

ELECTION TRIBUNAL, AKOLA

ELECTION PETITION No. 1 OF 1952

1. Bhikaji Keshav Joshi,
2. Mukund Vinayak Dhamankar—*Petitioners.*

Vs.

1. Shri Brijlal Nandlal Biyani,
2. Dr. K. V. Jogalekar,
3. Shri B. G. Meshram,
4. Shri Suryabhan S. Vaidya, All of Akola, No. 1 is now in the M.P. Cabinet, Nagpur—*Respondents.*

Finding recorded this 1st day of May 1953

This is an election petition under Section 80 of the Representation of the People Act, 1951 (Act 43 of 1951). The election was held for the Akola constituency of the Provincial State Assembly of Madhya Pradesh on 31st of December 1951. The respondents 1 to 4 were candidates at the election and the respondent No. 1 Shri Brijlal Nandlal Biyani was returned as a successful candidate. The petitioners Bhikaji and Mukund were electors in the Akola Constituency. They questioned the election of the respondent No. 1 and they have made this petition for a declaration that the Election be declared to be wholly void and in particular of the respondent No. 1. Among other grounds on which they claimed the relief, the main grounds are the illegal and corrupt practices alleged to have been resorted to by the respondent No. 1.

2 The election petition was presented to the Assistant Secretary Election Commission India at New Delhi on 19th April 1952 by Shri C. G. Walimbe. It was found by the Election Commission, that the petition was filed late by one day and it was thus barred by time. The petitioners were thereupon noticed to show cause why the petition should not be dismissed under section 85 of the Act as it was in contravention of section 81 Sub-section (1) of the Act, by a letter dated 8th July 1952 Ex P 7. To this the petitioners sent a reply on the 17th of July 1952 (Ex P 8) stating that they had already made an application dated the 28th April 1952 along with a duly sworn affidavit explaining the delay and praying for the condonation thereof. They also attached a copy of the application with that reply. Ex P 4 is that copy. On getting this reply from the petitioners the Election Commission condoned the delay and admitted the petition. A reply to that effect was sent, which is Ex P. 5. The Election Commission thereupon appointed this Tribunal under Section 86 of the Act for the trial of the petition.

3. The respondents 1 to 3 filed their written statements. The respondent No. 4 did not file any. The case was *ex parte* against him. The respondents 2 and 3 supported the petition. The only contesting respondent was the respondent No. 1. He filed his written statement raising preliminary objections to the maintainability of the petition. These objections may be classified under the following heads —

- (i) Absence of authority to the person *viz* Shri C. G. Walimbe on behalf of the petitioners;
- (ii) Failure to file the petition within the time prescribed,
- (iii) Failure to join necessary parties to the petition, and
- (iv) Failure to comply with the provisions regarding the contents of the petition and its verification.

Each one of the above points has been further sub-divided into minor details. It is needless to give these details here as they could be readily seen from the issues framed. The respondent No. 1 prayed that all the above questions should be tried as preliminary issues.

4 To the Written-Statement of the respondent No. 1 the petitioners filed their reply. They denied that the petition was not maintainable on the grounds alleged by the respondent No. 1. They further pleaded that in view of the fact that the petition was duly admitted by the Election Commission the objections raised by the respondent No. 1 do not survive for the consideration of the Tribunal and the Tribunal has no jurisdiction to entertain and try them.

5 Since a question of the jurisdiction of the Tribunal was involved we framed a preliminary issue in that respect. By our finding dated the 15th of July 1953 we came to the conclusion that in view of section 90 sub-section (4) of the Act the Tribunal had jurisdiction to decide the preliminary objections raised by the respondent No. 1. Thereupon all the preliminary issues were tried and now we have to record our findings on those issues.

6 The following are the preliminary issues framed and our findings thereon are given against them —

Issues	Findings
1. Whether the Election petition bad in law and invalid in as much as—	
(a) It does not contain a concise statement of the allegations of facts showing where and how the cause of action arose, and	No.
(b) It does not state that despite of security under section 117 has been made?	No.
2. (a) Whether the election petition does not contain a concise statement of material facts on which the petitioners rely?	But it is not fatal.
(b) Whether the list of particulars given in the petition and in the schedule are not in compliance with section 83 (2) as alleged by the respondent No. 1 in paras 9 (a) to (c) of his written statement?	No They are not.
c) Whether the petition is, therefore, bad in law and invalid?	Yes

Issues

Findings

3. Whether the election petition is also bad in law and invalid for the following reasons:—	Yes.
(a) The verification of the petition and the list is defective as alleged by the respondent 1 in para 5 of the written statement?	Yes.
(b) It has been presented jointly, and without giving security separately by?	No.
(c) It has been addressed to the Election Tribunal, Madhya Pradesh, Nagpur?	No.
4. (a) Whether Shri Sohoni, Shri Kulkarni and Shri Kothatkar were the candidates duly nominated at the election within the meaning of section 82?	Yes.
(b) Whether they were necessary parties to the Election petition?	Yes.
(c) Whether the petition is invalid in law by reasons of their non-joinder and is, therefore, liable to be dismissed?	Yes.
5. (a) Who authorised Shri Walimbe to present the petition at Delhi?	
(i) Whether the petitioners themselves?	Yes.
or	
(ii) Shri Gole?	Not proved.
(b) In case Shri Gole had authorised Shri Walimbe to present the petition whether he could legally do so?	Does not arise.
(c) Whether Shri Walimbe was not a person duly authorised by the petitioners to present the petition at Delhi as alleged by the respondent 1?	Does not arise.
(d) Whether the presentation of the petition is invalid in law?	No.
(e) Whether the acceptance of the petition was induced by misrepresentation and fraud as alleged by the respondent No. 1 and whether on that ground also the presentation of the petition is invalid?	No.
6. (a) Was there sufficient cause for delay in presenting the petition?	No.
(b) Was there negligence on the part of the petitioners and their counsel in the matter of presenting the petition as alleged by the respondent No. 1?	Yes.
(c) What is the effect of the findings on the above two issues?	Dismissal of the petition.
7. Whether this Tribunal has no power to condone the delay?	Yes, it has by implication.
8. (a) Whether the petitioners were bound to show the date of cause of action in the petition and the grounds for exemption from the operation of law of limitation in the petition itself?	No.
(b) Whether the petition is liable to be dismissed for their failure to do so?	No.
9. (a) Whether the Election Commission was bound to dismiss the petition on the grounds that it was in contravention of sections 81, 82 and 83?	Its act cannot be questioned by us.
(b) Whether it had, therefore, no jurisdiction to appoint a Tribunal to try the petition	Does not arise
Whether this Tribunal has consequently no jurisdiction to try the petition as alleged by the respondent No. 1?	Yes. It has.

7. In spite of our finding that the Tribunal has jurisdiction to try the preliminary issues under section 90(4) of the Act, the learned counsel for the petitioners has again raised this point from another point of view. He contends that though section 90 (4) of the Act confers jurisdiction on the Tribunal, that jurisdiction cannot be exercised so long as the order of the Election Commission admitting the petition stands. In other words his contention is that the Tribunal has jurisdiction if there is no decision of the Election Commission, but it cannot exercise it if there is any such decision. It is argued that where a legislature confides the decision of a thing as per executive's opinion, satisfaction or discretion, such a decision is conclusive and beyond the periphery or area of the jurisdiction of

the court. The court can investigate only if the Executive has acted *malafide* or beyond its powers. In support of this proposition he relies on *In Re Banwarilal Roy* 48 C.W.N. page 766; *Hubli Electric Company Ltd. Vs. Province of Bombay* A.I.R. 1947 Bombay page 276; *Province of Bombay Vs. Khushaldas* A.I.R. 1950 Supreme Court, 222.

8. On the basis of this principle it is contended by him that the Election Commission has been authorised to receive the election petition and to admit them after getting themselves satisfied whether they comply with the provisions of sections 81, 83 and 117 of the Act. The Election Commission in the present case got itself satisfied that the petition complied with those provisions and has admitted the petition. The admission of the petition implied a decision by the Election Commission that the petition complies with the above provisions. That decision is final and so long as it stands this Tribunal cannot try those very points. We agree with the proposition of law on which the learned counsel of the petitioners relies. But in our opinion that proposition is not applicable to the present case. In all the cases cited the authority concerned was the sole authority appointed to decide the matter under the particular Acts. Such is not the case with the Election Commission—under the Representation of the People Act 1951. The Election Commission has not been appointed as the sole authority to determine whether the Election petition complies with the provisions of sections 81, 83 and 117 of the Act. That is clear from the wording of section 90(4). The word 'notwithstanding' is significant and it shows that the Legislature has vested the Tribunal with powers to investigate and decide the very questions which the Election Commission is also called upon to decide. In our opinion, therefore, the Tribunal has jurisdiction under section 90(4) of the Act to investigate and decide whether a petition does or does not comply with sections 81, 83 and 117 of the Act.

9. In view of the clear provisions of section 90(4) it is not necessary for us to look into the intention of the Legislature in making these provisions. The point, however, has been argued before us at length by both the sides and we may, therefore, discuss the purpose for which, according to us these particular provisions were made in the new Act. Such a provision does not find place in the old Election Law. This provision appears to have been made with some purpose. The rules for elections were made in India twice during the British regime. After the Montague-Chamsford-Scheme the rules were made in the year 1920 and after that when the Government of India Act was amended and more rights were conferred on the people by the British Sovereign the election rules were again framed in 1956. In the year 1920 all election petitions were to be presented to the Governor-General while in the year 1936 when more rights were conferred on the people the petitions were presented to the Governor. The whole power was centred in their individual judgment and the decisions were final in the matter of admission of Election petitions. The present Act—The Representation of the People Act—was passed in 1951 in entirely changed circumstances. The election law, has undergone change with the ushering of the democratic Government in India. The Election petitions are now required to be filed before the Election Commission set up by the Constitution. The Commission is authorized to receive the petition and is empowered to dismiss it if it does not satisfy the provisions of sections 81, 83 or 117 of the Act. In the old Election Law the decisions of the Governor-General and the Governor were final. That law might have been made to suit the political conditions then prevailing. But now there is a change in the political conditions. The whole power now vests in the people, who are represented by an elected Legislature. The purpose appears to be to get judicial decision, after the appearance of the other side, in respect of those matters. According to the concept of the democratic principles the person against whom the petition is made is interested in the matter of acceptance or rejection of the petition. The decision taken by the Election Commission is behind his back. Consequently, all the necessary facts which are likely to come up before the Tribunal as a result of inquiry after contest by the opposite party may not be presented before the Commission. It is for this reason that section 90(4) has been enacted to decide the matter judicially after giving full opportunity to the parties concerned. We are, therefore, of opinion that in spite of the admission of the petition by the Election Commission we can yet exercise our jurisdiction under section 90(4) to entertain those very objections and decide them.

10. Before coming to the actual discussion of the issues we must bear in mind that we have to apply the Election Law. The Representation of the People Act is self-contained enactment so far as the election are concerned which means that whenever we have to ascertain the true position in regard to any matter connected with the Elections we have only to look at the Act and the rules framed thereunder. The election law is a creature of the Statute. It is a special law and it must be construed strictly. The following observations in *N. P. Ponnuswami Vs. The*

Returning Officer Namakhal Constituency A.I.R. 1952 Supreme Court page 64 at page 71 are pertinent in this respect.—

“A jurisdiction of that kind is extremely special and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in such a way that it should as soon as possible become conclusive and enable the constitution of the Legislative Assembly, to be distinctly and speedily known.”

“The right to vote or stand as a candidate for election is not a civil right, but is a creature of statute or special law and must be subject to the limitations imposed by it. Strictly speaking, it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it.”

We are, therefore, bound to apply the provision of the Representation of the People Act strictly and only look to the general law or other provisions of law when there is no express provision in the Act.

11. *Issue No. 1.*—Obviously, how the petition should be framed is not stated in section 83. It should be like the plaint. But from Section 83, it would not necessarily follow that the date of the cause of action should be given. But in this particular case, it was necessary to do so. In our view, the application contains a concise statement, but a very imperfect and incomplete statement of facts. But on that ground the application need not be rejected as it is not covered by section 82(1) and (2). The points which are not given in the application could be amended under section 90 sub-clause 2. There are no special rules made for the purpose and when no special rules are made the provisions of the Civil Procedure Code could be applicable as far as it may be. We, therefore, decide point 1(a) in the negative. As regards point (b) this point was not stressed. The deposit was actually made in time.

12. *Issue No. 2(a).*—This issue is something like issue No. 1(a). It is a matter of opinion as to whether it contains a concise statement of the material facts. Therefore, on that ground the application need not be dismissed or rejected. We decide this point in the negative.

13. *Issue No. 2(b), (c) and 3(a).*—This is an important point. According to Section 83, an election petition shall contain a concise statement of the material facts on which the petitioner relies, and shall be signed by the petitioners and verified in the manner laid down in the Code of Civil Procedure (1908) for the verification of pleadings. It would thus appear that the question of verification arises in the election petition not on the basis of the ground that the provisions of the Civil Procedure Code are to be made applicable to the proceedings before the Election Commission under Section 90(2) of the Election Law, but the manner of verification is embodied in the Election law itself in section 83, and it must, therefore be strictly complied with. Under Order 6 Rule 15 C.P.C. a person verifying shall specify by reference to the numbered paragraphs of the pleadings, what he verified of his own knowledge and what he verifies upon information received and believed to be true. Then, the verification shall be signed by the person making it, and shall state the date on which and the place at which it was signed. The verification namely the contents of the plaint are true to the best of my knowledge and belief, though substantial, is not a strict compliance with the requirements of the law. (Vide—paragraph A-189, page 589, of the Civil Procedure Code by Chitale, Abridged Edition, 1947, and the cases referred to thereunder). Under the Civil Procedure Code, Order 6 rule 15 finds place in the orders which is a matter of procedure. But when the matter is embodied in the Statute law, its provisions ought to be strictly complied with. (Vide, A.I.R. 1952 Supreme Court page 64 at 71).

14. In this particular case, it would appear that the verification is as follows:—

“The above-named applicants affirm that the contents of the above petition are true to the information received from the Press Reports and several other Electors, and believed by them to be true”.

This verification, does not refer to any numbered paragraphs nor does it bear any date. It would thus appear that this is not a sufficient compliance with the provisions of Order 6 rule 15 of the Civil Procedure Code. The argument of the respondent No. 1 that the petition is not properly verified as required by Section 83(1) is therefore, quite correct.

15. It was argued that this is a matter of minor importance, and that such small mistakes could be corrected under section 83(3) of the Election Law. This section i.e. 83(3) states:—

“A Tribunal may upon such terms as to costs and otherwise as it may think, at any time allow the particulars included in the said list to be amended, or order such further and better particulars in regard to any matter referred to therein be furnished, as may in its opinion be necessary for the purpose of ensuring a fair and effectual trial of the petition.”

It would thus appear that the scope of this section is very narrow, and only the particulars included in the list could be amended. Therefore, the view of the respondent No. 1 that the verification cannot be amended appears to be correct. The question of verification so far as this Act is concerned is not a matter of procedure which could be rectified by the provisions of section 90 sub-section (2) of the Election Law. The manner of verification is embodied in section 83(1) of the Act. Thus the manner of verification does not now remain a matter of procedure, but it becomes a part of the statute law and ought to be, therefore, strictly complied with and when the petition is not verified according to the provisions of the Statute Law contained in section 83 sub-section (1) of the Election Law it offends the provisions of that particular section and is liable to be dismissed under section 90(4) of the Election Law.

16. About the list of particulars, it must be said that the list is considerably defective. Section 83(ii) of the Election Law is very clear. It demands from the applicant full particulars of any corrupt or illegal practice which the petitioners allege, including as full a statement as possible as to the names of the parties alleged to have committed such corrupt and illegal practices, and the date and place of the Commission of each such practice. A literal compliance of this provision is necessary for the simple reason that unless this is done, the whole matter would not be clear and there would be a difficulty at the stage of evidence. The idea underlying this law is that the trials of these cases should be quickly finished. In this case, the defects are as follows:—

- (i) The corrupt practices are mentioned in paragraphs 1(a), (b), (c) and (d), but it has not been mentioned as to who did so, whether the respondent himself or any one on his behalf; and when it was so done and what amounts were paid and to whom.
- (ii) In paragraph 2, it is not stated who threatened the voters for respondent No. 1 and when. It is further not stated who removed the posters and how they were connected with respondent No. 1 and when.
- (iii) In paragraph 4, it is not stated who issued the pamphlets and hand-bills, and when.
- (iv) In paragraph 5, it is not stated who collected the ballot papers bundled together and put them in the ballot box. Then, it is also not stated who were the persons working for and on behalf of the respondent No. 1 who had accepted illegal gratification. The persons, who did so with the connivance of the respondent No. 1 are also not named.
- (v) In paragraph 6, it is not stated whose personation was made and when.
- (vi) In paragraph 7, the names of persons who announced on loud speakers something derogatory to Dr. Joglekar are not mentioned, nor is the date given. The name of the person, who called Dr. Joglekar as Mishra's man is also not given. All these allegations are very vague.
- (vii) In paragraph 8, the names of those persons carrying the voters to the polling station in hired cars are not mentioned, much less their relation to the respondent No. 1 shown.

17. Clearly then, all these details which were necessary are wanting. If the application had been heard on merits, there would have been a confusion. The law lays down that the facts should very clearly be stated. It is possible that when the names are given, there is a possibility of those persons being won over. But if the names and dates are allowed to remain in secret, then any evidence could be brought before the Tribunal. The evil in the second case outweighs the evil in the first case. The law, therefore, under section 82(ii) is very clear, and it ought to be complied with, and in this case, there is no doubt that the list of particulars does not comply with the provisions of section 82(ii) of the Election Law. There is no application for amendment of these particulars before us.

18. The particulars given in the list can be amended indeed. But fresh instances cannot be given (*vide* Nanakchand's law of Election page 385 and the cases referred to thereunder). In this particular case, however, we have already noted that the particulars are absolutely vague. There is a purpose of the law why the particulars are required to be clear. A petition makes very serious allegations against other party. He makes allegations that a certain person did something which offends against the Election law. The question then arises as to whether this has so happened and whether that particular person was authorised by the opposite party to act on his behalf. It is easy to make vague allegations and to raise dust but if that is permitted the whole trial would be clumsy and could be changed at any time and the other party would always be in the dark. The law does not contemplate that. The law desires that specific allegations should be made, the names of the persons should be given and the dates also should be given so that everything should be known to the opposite party who should be asked to meet that case. In this particular case no such allegations are made and it would perhaps be doubtful whether, as the election petition stands, the amendment could be made. But even if that could be, it is very clear that at present there is no application for amendment before the Tribunal and, therefore, as the particulars given in the list of particulars are not absolutely clear, the provisions of section 83(2) are violated and the application is on that ground liable to be dismissed under section 90(4) of the Election Law. Even if such application for amendment could be made time to do so has long been passed now and no amendment could be allowed at this stage. Therefore, the application as it stand offends against the provisions of rule 83(2), and is liable to be dismissed under Section 90(4). Under these circumstances, there is no doubt that the Election Petition is bad in law and invalid.

19. This point was considered and decided in Election Petition No. 83/52 by the Election Tribunal, whose order has been published in the *Gazette of India Extraordinary* dated 10th October 1952 (No. 427), from pages 2262 to 2289. That Tribunal also held that when the particulars were not given correctly the application was liable to be dismissed on that ground. In that case also, the list was not verified according to the manner provided in the Civil Procedure Code and the petition was not accompanied by a list verified according to the manner provided in the Civil Procedure Code and the petition was not accompanied by a list verified, as required by section 83(2) of the Act. In that case also, the particulars were so vague that they were no particulars at all. (*Vide* paragraphs 10 and 11 of that Order)? We respectfully agree with the reasoning of that Tribunal. We find the issues accordingly.

20. *Issue No. 3(b).*—It would appear from Section 110 that the law contemplates joint petitions. Therefore, an application filed by the 2 petitioners without giving 2 separate securities is proper. This point can, therefore, be decided in the negative.

21. *Issue No. 3(c).*—Even though the application shows that it was addressed to the Election Tribunal, Madhya Pradesh, Nagpur, the application was as a matter of fact received by the Election Commission Delhi, and the clerical mistake in writing is merely an irregularity. The election petition cannot be said to be bad on the ground. For all these reasons, we decide these three points (a), (b) and (c) in the negative.

22. *Issue No. 4(a).*—There is no doubt that these persons *viz.*, Shri Sohoni, Shri Kulkarni and Shri Kothakar, were nominated candidates. It would appear from rule 2(f) page 184 of the Manual of Election, that a validly nominated candidate means a candidate who has been duly nominated and has not withdrawn his candidature in the manner and within the time specified in sub-section 1 of section 37, or sub-section 4 of section 39, as the case may be. The position then is as follows. There are candidates. Then there are duly nominated candidates. Then there are validly nominated candidates. Everyone who stands for an election is a candidate. When he is legally nominated and supported, he becomes a duly nominated candidate, and when his nomination paper is accepted and he does not withdraw within the time allowed by the law, he becomes a validly nominated candidate. Under these circumstances, then, it was necessary for the applicants to make these 3 persons, Shri Sohoni, Shri Kulkarni and Shri Kothakar, who were duly nominated but who were not validly nominated inasmuch as they had withdrawn their candidature, as parties to these proceedings. Under section 82, a petitioner shall join as respondents to his petition all the candidates, who were duly nominated at the election other than himself. If he was so nominated. Therefore, the applicants were bound to make these persons parties to this application. The point is that everyone, who was interested in the election somehow or

the other, ought to have a say in the matter. A candidate who simply wishes to stand gets interest into the election only when he is duly nominated, and not till then. The entire petition must fail on account of the petitioners' failure to join all the duly nominated candidates as respondents (Vide page 395 of the Indian Election Law by H. L. Sarin).

23. In this connection it would be pertinent to refer to para No. 2 contained in the reply of the petitioners' to the Written-statement of the respondent No. 1 on 16th October 1952.

"Without prejudice to the above the petitioners submit that they have joined all the duly nominated candidates at the Election as defined under rule 2(f) of the Rules and whose names were published under rule 11 under the representation of the People Act in the Madhya Pradesh Gazette. Shri Sohoni, Shri Kulkarni and Shri Kothakar were not so duly nominated candidates at the election. "It would thus appear that the petitioners are defining the duly nominated candidates in their own way. It is true that the term *duly* nominated candidate is defined in this Act, but validly nominated candidate has been defined in rule 2(f) of the Act, page 184 of the Manual of Election Law". Validly nominated candidate means a candidate, who has been duly nominated and has not withdrawn his candidature in the manner and within time specified in sub-section 1 of section 37 or in that sub-section read with sub-section 4 of section 39 as the case may be".

24. To this provision the petitioners have referred to in their reply to para 2 of the written-statement of the respondent No. 1. They consider that the candidates defined in this provision were all made parties. But a validly nominated candidate includes a duly nominated candidate. In other words the circle of validly nominated candidate includes the circle of duly nominated candidates. The nomination paper is given in schedule II page 253 of the Manual of Election Law. In that nomination paper the heads Nos. 13 to 16 show that the nomination is to be seconded by a person, who is himself entitled to vote. In other words a person is nominated by one and when he is duly seconded by another person competent to second him he becomes duly nominated. We thus find that the general term is "Candidates". Out of the candidates some are duly nominated candidates and out of those duly nominated candidates some are validly nominated candidates. The applicants have made only validly nominated candidates as parties to this petition. They admit that these three persons are candidates which does not exclude the possibility of their being duly nominated candidates as understood by section 79(6) of the Act. There is thus no denial of the fact that they are duly nominated candidates. This offends against the provisions of section 82 of the Election law. These provisions contained in Section 82 are mandatory and they ought to be strictly complied with. The reason that everyone, who had something to say in the matter of Election ought to have a chance to state his grievances before the Election Tribunal (Vide Nanachand's Election Cases page 377 and the cases referred to thereunder.) For these reasons therefore, we consider that the petitioners did not make all the duly nominated candidates parties to this election petition and their application is liable to be dismissed as not in conformity with the provisions of section 82 of the Election law.

25. For these reasons points 4(a), (b) and (c) are all decided in the affirmative.

26. Issue 5(a) to (e).—The petitioners' case is that they had duly authorised Shri Walimbe in writing to present the petition at New Delhi to the Election Commission and he has done accordingly. The respondent No. 1 denies this. The pleadings of the respondent No. 1 in this respect are contained in para 3(i) to (x) of the written-statement. Having denied that Shri Walimbe had authority in writing to present the petition, the respondent 1 further suggests that it was Shri Gole who had authorised Shri Walimbe to present the petition and, therefore, the petition cannot be considered to have been presented by a person authorised in writing in this behalf by the person making the petition. Suggestion is based on assumptions and not on facts. It can hardly be considered to be a proper pleading according to the rules of pleadings. The pleading of the respondent No. 1 in this respect is not thus precise. It is vague and inferential.

27. Section 81(2) (b) permits presentation by a person authorised in writing in this behalf by the person making the petition. The words "authorised in writing" do not mean that the entire instrument of authority should be in his hand writing. All that it means is that the instrument should be in writing and it should be signed by him. If a person signs the instrument which is written by somebody else on his behalf that would be sufficient compliance of the above provisions. All that is necessary to see is whether the petitioners have themselves authorised a person and whether that authority is in writing and signed by him

28. The petition was presented by Shri Walimbe to the Election Commission at New Delhi. Ex. P.1 is the instrument of authority to Shri Walimbe. It bears the signature of the petitioners. The petitioner Bhikaji has entered the witness box and swears that he and the other petitioner M. V. Dhamankar have signed it. The signatures of the petitioners have not been questioned. There is thus an instrument of authority in writing which has been signed by the petitioners. As mentioned by me above the contents of the instrument may have been typed or written by any other person. That is immaterial. The question as to who filled in the contents of Ex. P. 1 is not important. What is important is whether the contents were written or typed at the instance of the petitioners. If the petitioners had authorised Shri Walimbe it is needless to consider who typed the contents and who put in the name of Shri Walimbe therein. It is also needless to consider when and where the name was put in the instrument of authority provided it was here at the instance of the petitioners and not at the instance of anybody else.

29. Bearing in mind this principle we now proceeded to discuss the evidence on record. Before doing so it is necessary to consider the question of burden of proof. Before us there is a written authority in writing Ex. P. 1. It purports to have authorised Shri Walimbe by the petitioners. Under the authority Shri Walimbe presented the petition before the Election Commission and it was accepted as validly presented. These circumstances throw the burden of proof on the respondent No. 1 to establish that Shri Walimbe was not authorised by the petitioners. It is true that the burden is to prove a negative fact, but that would not change the position of law. It has to be discharged, however, difficult it may be.

30. The pleading of respondent 1 which is vague as observed by us above is that it was Shri Gole, who had authorised Shri Walimbe. The respondent could prove this by examining Shri Walimbe and Shri Gole. As a matter of fact he had cited both of them as his witnesses. A commission was issued to Shri Walimbe at New Delhi. It was called back at the instance of the respondent 1 Shri Gole was present in Court when the evidence was recorded. The respondent 1 gave him up. The respondent No. 1, it appears, intended to prove affirmatively that it was Shri Gole, who had authorised Shri Walimbe. From that point of view both Shri Walimbe and Shri Gole were the most important witnesses. Since they were given up when their evidence was available an inference can safely be drawn that had they been examined they would not have supported the respondent 1. It might be argued that they were given up as they were interested in supporting the petitioners. It is difficult to believe that a man of the position and status of Shri Gole would not state the truth on oath and would state that he had not authorised Shri Walimbe if he had really authorised him. The inference that Shri Walimbe and Shri Gole would not have supported the respondent 1 is in our opinion quite justified.

31. Not only that he did not examine Shri Walimbe and Shri Gole but he did not adduce any evidence whatsoever in this respect. The petitioner Bhikaji has entered the witness box and he has been extensively cross-examined by the counsel of the respondent No. 1. It is true that the respondent 1 could discharge the burden by eliciting facts in the cross-examination of the witness and it is to be seen whether the respondent 1 has been successful to do so.

32. The petitioner Bhikaji swears that he had authorised Shri Walimbe. As against his sworn testimony there is some material in his cross-examination and it is contended for the respondent No. 1 that that material is enough to discharge the burden which lay on him.

33. The petitioners had made an application for condonation of delay. Ex. P. 4 is the copy of that application. In that application the petitioners mentioned the grounds on which they prayed for condonation and he admits that the contents of that application are true. In para. 4 of the application they state as under:—

"The applicants prepared their election petition on the 17th of April 1952. They sent the said petition with Shri P. B. Gole, senior Advocate Akola with a written authority to present the petition through any person of his choice at Nagpur on the 18th of April..... Accordingly Shri Gole left Akola for Nagpur by the 1 Down Nagpur Mail reaching Nagpur at about 9-30 A.M. on 18th April 1952."

Later on in para. 5 they state as under:—

"On enquiries Shri Gole learnt that there was none at Nagpur, who was authorised to receive the election petition under the Act. Under these circumstances Shri Gole booked his seat in the night plane for Delhi

and flew to Delhi, on the 18th and reached there, on the morning on 19th April 1952. On 19th April he caused the petition to be presented to the Secretary to the Election Commission."

34. As A.W. 1 he makes the following statement in para 6—

"The legal advisers advised me to file the petition at Delhi, but some persons like Puradupadhye and others said that Nagpur being the Provincial seat the petition could be admitted at Nagpur. Thereupon after some discussion all (including the legal advisers) told that the petition be first taken to Nagpur for presentation and then taken to Delhi if required." I then requested Shri Gole to go to Nagpur taking the Election petition with him and after enquiring present it there and if it could not be presented there he should proceed to Delhi."

The version of Bhikaji as A.W. 1 is different from that in Ex. P-4. In the latter there is no reference to petitioner's asking Shri Gole to go to Delhi. There is nothing in Ex. P-4 to show that the petitioners intended to present the petition at Delhi. On the basis of this omission it is argued that the version of the witness before the court is an after-thought. The petitioners had not intended to present the petition at Delhi and it was Shri Gole, who went to Delhi on his own responsibility and presented the petition after filling in the name of Shri Walimbe in Ex. P-1 or causing it to be filled. On the other hand it is argued for the petitioners that it was not necessary for them to state all the facts which Bhikaji has stated as A.W. 1 in that application, as it was meant only for condonation of delay. They only wanted to show that Shri Gole was sent to Nagpur under a *bona fide* belief that the petition could be presented there and time was spent at Nagpur in that connection. It is difficult to say that the explanation is false. It is plausible.

35. Bhikaji A.W. 1 further states that when Shri Gole was sent to Nagpur they had given him 4 or 5 authorities including Ex. P-1. As for authorities other than Ex. P-1 he says that the portion for filling in the name was left blank and Shri Gole was instructed to get the petition presented through any person of his choice. As for Delhi he states that Shri Gole had no choice and he was instructed to file the petition through Shri Walimbe. When asked as to why Shri Gole was given choice at Nagpur and not at Delhi he states that at Nagpur they could not get a man of common acquaintance there, while they got a man of common acquaintance at Delhi. On the basis of this statement it is argued that Shri Gole must have been given only one authority Ex. P-1, which was blank and he must have used it by putting the name of Shri Walimbe for presenting it at New Delhi.

36. Bhikaji A.W. 1 further says that he does not remember, who wrote the words "Shri Walimbe" in Ex. P-1. He also says that he does not remember when the typed word "Nagpur" in Ex. P-1, was substituted by "New Delhi". Ex. P-1 is not dated. He, however, definitely states that the words Shri "Walimbe" were already written in Ex. P-1 before he signed it.

37. That is all the material appearing in the cross-examination of Bhikaji A.W. 1. Now are these circumstances sufficient to hold that the petitioners did not authorise Shri Walimbe? Bhikaji A.W. 1 has given explanation of the circumstances which stand against the petitioners. In our opinion the conduct of Bhikaji raises mere suspicion. This suspicion is not enough to outweigh his sworn testimony. It is a fundamental principle of justice that suspicion and conjectures cannot be made the foundation of a judicial decision. Though evidence has been adduced before us it is so scanty and it is of such a nature that the question of burden of proof assumes importance. On consideration of the evidence before us we find that the respondent 1 has not discharged the burden of proof. We find the issues accordingly.

38. Issues 6(a), (b) and (c) and 7.—These issues cover the point of limitation. The petition was admittedly barred by time by one day. The petitioners made an application to the Election Commission to condone that delay of one day. Ex. P-4 is a copy of that application. The application was allowed and the Election Commission condoned the delay under the proviso to rule 85 of the Act. The petition was admitted and the present Tribunal was appointed by the Election Commission under section 86.

39. Section 81 requires that the petition may be presented within the period of limitation prescribed and we have given our finding that under section 90(4) we have jurisdiction to investigate into the question of limitation and arrive at our conclusions. It is contended by the respondent 1 that the powers of the Election Commission under section 85 of the Act are not co-extensive with the powers of the Tribunal under section 90(4). It is argued that the Election Commission has powers to condone the delay under the proviso to section 85 and no

such powers are conferred on the Tribunal under section 90 (4). It is accordingly urged that the Tribunal should dismiss the petition as it is barred by time and should not look into the question of condoning the delay.

40. It is true that the wording of the two sections is not identical. That wording is as under.—

Section 85.—

"If the provisions of section 81, section 83 or section 117 are not complied with, the Election Commission shall dismiss the petition.

Provided that if a person making the petition satisfies the Election Commission that sufficient cause existed for his failure to present the petition within the period prescribed therefor, the Election Commission may in its discretion condone such failure."

Section 90(4).—

"Notwithstanding anything contained in section 85 the Tribunal may dismiss an election petition which does not comply with the provisions of section 81, section 83 or section 117."

The wording of the two sections makes it clear that the Tribunal has discretion to dismiss the election petition as barred by time in spite of the condonation of delay by the Election Commission. It may agree with the Election Commission in that respect or it may not agree. That necessarily follows from the word "may" used in section 90(4). The legislature has advisedly used the words "may" and not "shall".

41. The contention of the respondent 1 would hold good if the word "shall" had been used. The use of the word "may" definitely indicates that the Tribunal is invested with the power of looking into the question of the delay in making the petition. The Tribunal on making inquiry into the question may dismiss the petition if it finds on the basis of material produced before it that the delay is not excusable. It may also not dismiss it if it finds the delay is excusable and thus agree with the Election Commission. The word "may" indicates discretion and the discretion in the matter cannot be exercised unless the question of delay is taken into consideration. We are of definite opinion that the provisions of section 90(4) cannot be effectively exercised unless the question of delay is investigated and taken into consideration by us. It is true that the Tribunal has not been expressly empowered to condone the delay but that power follows by implication by the wording of section 90(4). If the Tribunal is empowered not to dismiss the petition when the matter is agitated before it by the parties that in substance means that it is empowered to condone the delay though the power has not been given in express words. The powers of condonation are given in express words to the Election Commission because it is entrusted with the function of admitting the petition. Before the Tribunal there is no question of admitting the petition. It has to see whether the petition complies with certain sections of the Act and it is empowered to dismiss the petition if there is no compliance. While doing so it necessarily has to consider the question of delay, while deciding the point of limitation. That in substance is whether the delay should be condoned or not. We find issue No. 7 in the affirmative.

42. The question is whether we should exercise the discretion vested in the Tribunal by the provisions of section 90(4). The Tribunal does not sit in appeal over the decision of the Election Commission while exercising its discretion under that section. It has been empowered to look into the matter afresh. The Election Commission has to take decision *ex parte*. In our opinion it has to see *prima facie* whether the petition complies with the provisions of section 81, 83 and 117 and on being satisfied that it is so it has to admit the petition and appoint a Tribunal. The person against whom the petition is made is interested in the matter covered by sections 81, 83 and 117. By being elected he has obtained certain rights. He is entitled to see that he is not deprived of those rights except in due course of law. As such he is entitled to contest the valid presentation of the petition, including its presentation within limitation. Justice demands that he should have an opportunity to exercise those rights. In the days of democracy where the rights vest in the people they cannot be denied to them by mere executive acts done behind their back. It is for this reason that section 90(4) has been enacted. It empowers the Tribunal to reconsider the points again in the presence of the parties and that is just in consonance with the principles of justice. If some facts which were not before the Election Commission are brought before the Tribunal, it may not agree with the Election Commission.

43. In our opinion the power granted to the Tribunal under section 90(4) is important and we ought to exercise it. For this principle we rely on *Gaodeo*

Vs. *Rajan* 1953 N.L.J. page 7 at page 10 and on Commissioner of Police Vs. *Goverdhandas Bhimji* A.I.R. 1952 Supreme Court page 16 at page 21 paras 27 and 28. The following observations in the above two rulings are pertinent in this respect.

"When a statute confers an authority to do a judicial act in a certain case it is imperative on those so authorised to exercise the authority when the case arises and its exercise is duly applied for by a party interested and having the right to make the application".

(1943 N.L.J. page 7 at page 10).

"An enabling power of this kind conferred for public reasons and for the public benefit is in our opinion complied with a duty to exercise it when the circumstances so demand." (A.I.R. 1952 Supreme Court page 16 para. 28).

The respondent 1 has contended before us that the application should be dismissed as barred by time. We are empowered to dismiss it under section 90(4) and we, therefore, ought to consider the point of limitation which involves the question of justification for delay.

44. The grounds for condonation of delay are mentioned in the petitioners' application dated 28th April 1952 Ex. P-4. They are contained in paras 3 to 6 of the application. They pray that they were under two *bona fide* beliefs contained in those paras. and it was due to them that there was delay. The two beliefs are as under—

- (i) They were under the belief that notice under rule 113 of the Rules framed under the Act was published on the 5th of April 1952 of the official Gazette of the state of Madhya Pradesh, when in fact it was published on the 4th.
- (ii) They were under the belief that an officer contemplated by section 81 of the Act must have been appointed by the Election Commission for every State and they, therefore, felt that it would be possible to present the petition at Nagpur, the capital of the State of Madhya Pradesh. But as a matter of fact none was appointed.

On behalf of the respondent 1 it is argued that the petitioners were grossly negligent and there were no *bona fide* beliefs.

45. Let us now scrutinize the evidence and find out whether the petitioners acted under *bona fide* beliefs or negligently. Out of the two petitioners it appears from the evidence of Bhikaji that the other one took no active part whatsoever. He alone was the prime mover. He is a fairly educated man and knows English. He appeared to us intelligent. He was present at Akola at the time of election. He took decision to file the election petition two months prior to its drafting. What did he do after taking this decision for a period of two months? He did not read rule 113 of the Representation of the People Rules nor did he read rule 119. He did not look into the Gazette to find out the date of publication. He did not care to know what was the period of limitation prescribed. He has not seen even now the publication in the Gazette. He did not care to know from proper and authoritative sources whether the petition could be presented at Nagpur. Some persons told him that it could be presented there. He admits that he did not know the law and did not study it. Thus for a period of two months he did not care to know the date of the publication in the Gazette and the place where the petition was to be presented.

46. It was only 4 or 8 days prior to the drafting of the election petition that he moved in the matter. Till then he was inactive. Within 3 or 4 days before the drafting of the petition he collected the funds by making contributions and some 4 or 8 days prior to the drafting he sought the advice of the legal practitioners Shri Gole and Shri Sohoni. Besides this he did nothing. He says that he relied solely on his legal advisers. It is clear that he himself did not act with due care and attention.

47. As for the belief in respect of the place of presenting the petition he admits that his legal advisers told him to file the petition at Delhi. He says that the belief that it could be filed at Nagpur was created as a result of information received from Puradupadhye and others. These were not the legal practitioners and he has not shown that source of knowledge they had. None of them has been examined to show that they were responsible for creating the belief in the petitioners. It is surprising that he relied on these persons and went to the length of addressing the petition to the Election Commission at Nagpur and putting the words Nagpur in Ex. P-1 and sending Shri Gole to Nagpur. Having first stated that his legal advisers told him to file the petition at Delhi he later on admits that they were not in a position to decide where the petition could be presented at the time when the petition was finally drafted. That drafting was on

the night of the 17th. Shri Gole started for Nagpur on the 18th morning by mail which must be at 4 or 5 A.M. When did the legal advisers tell him that the petition should be presented at Delhi and when did Puradupadhye and others tell him that it could be presented at Nagpur? That could be only on the night of 17th. Why did he not then rely on the words of his legal advisers? Why did he gave preference to Puradupadhye and others?

48. As for the belief in respect of the date of the publication he says that it was entertained by him on information given by his friends and lawyers. Who were those friends and lawyers? He does not name them specifically. He did not examine them to show that they were responsible for creating that belief in him. The evidence on record clearly shows that the petitioners were negligent in the matter of presenting the petition.

49. Taking for granted that the petitioners entirely relied on the legal advisers where is the reliable evidence to show that this is a fact? He should have examined the legal advisers. He alone cannot be relied on. Moreover taking for granted that he relied on legal advisers it should have been shown that they gave him the advice in good faith and they were not negligent. *Prima facie* if the legal advisers do not care to know the essential facts for presentation of an election petition namely relating to limitation and place of presentation it is difficult to say that they acted in good faith. Failure to get that essential information would amount to negligence on their part also. It was necessary for the petitioners to examine them.

50. The petition was drafted on the 17th night. Even according to the *bona fide* belief of the petitioners there was only one day left. The legal advisers told him that Delhi was the place while some others told him that it could be presented at Nagpur. That must have created some doubt. Why did the petitioners leave the presentation and preparation of the petition till 17th night? That also shows negligence. The following observations in Pandit Krishna Rao vs. Trimbak I.L.R., 1938 Nagpur page 409 are very important and useful for the purpose of this case:—

"When the time for filing an appeal has once passed a very valuable right is secured to the successful litigant and the Court must, therefore, be fully satisfied of the justice of the grounds on which the appellant seeks to obtain an extension of time for attaching the decree and thus perhaps depriving the successful litigant of the advantage which he has obtained."

"It is the duty of a litigant to know the last date on which he can present his appeal, and if through delay on his part, it becomes necessary for him to ask the Court to exercise in his favour the power contained in section 5 of the Indian Limitation Act, the burden rests on him of adducing distinct proof of the sufficient case on which he relies."

"An appellant who wilfully leaves the preparation and presentation of his appeal to the last day of the period of limitation prescribed therefor, is guilty of negligence and is not entitled to an extension of time if some unexpected or unforeseen contingency prevents him from filing the appeal within time."

"The Court while exercising its discretion under section 5 of the Indian Limitation Act will necessarily look into the conduct of the appellant and will only exercise its discretion in favour of a person who is found to be diligent and not in favour of one who is guilty of laches or negligence."

vide also Karansing vs. Kartarsing A.I.R. 1951. Simla page 170.

51. Thus the petitioners have been extremely negligent. If they relied on the legal adviser—which has not been established—the mistakes committed by them also show negligence. The question is whether this negligence should be ignored and we should not dismiss the petition as barred by time.

52. It is argued for the petitioners that the delay was only of one day and in as much as they acted honestly they should be considered to have acted in good faith. According to them there was sufficient cause for delay. In the absence of any test laid down for the Tribunal while exercising the powers under section 90(4), we take sufficient cause as the test. That test is laid down in section 85 and may in general be considered to be the proper test. What is sufficient cause? We find the expression used in section 5 of the Limitation Act. The judicial decisions in point explaining that term may be made use of in finding out its meaning. The expression "sufficient cause" has been held to mean a cause which is

yond the control of the party invoking the aid of the section. In other words means a *bona fide* cause—an act done *bona fide* or in good faith. As for good faith it is defined in the Limitation Act as under. Nothing shall be deemed to be done in good faith—which is not done with due care and attention. Thus if the party has not acted with care and attention he cannot be considered to have acted in good faith and it cannot be said that there is sufficient cause. It follows that if a party acted negligently he cannot be considered to have acted *bona fide* and it cannot, then be said that there is sufficient cause.

53. It is contended for the petitioners that the definition of the term "good faith" as given in the General Clauses Act should be applied. Under those provisions an act may be done honestly and in perfect good faith although it may have been done negligently. When any action is barred by time a valuable right is created in favour of the opposite party and the right so secured cannot lightly be ignored. From that point of view we prefer to follow the definition given in the Limitation Act. Negligence has not been held to be a sufficient excuse for delay in the cases coming under section 5 of the Limitation Act. That section is applicable to an appeal, revision and certain applications. As observed above by us the Election Law is to be strictly applied. It is to be applied more strictly than the law under which appeals, revisions and applications under section 5 are contemplated. Thus a stronger case for condonation is required in the case of election than any other law. If negligence is no sufficient cause for condoning delay in the cases of other laws it can hardly be a sufficient cause in the election law; So if there is negligence even of only one day the delay cannot be condoned. We, therefore, come to the conclusion that the petitioners were negligent. The delay cannot be condoned and the petition is liable to be dismissed as barred by time. We find the issues accordingly.

54. *Issue No. 8.*—The ingredients of the plaint are given under Order 7 rule 1 of the Civil Procedure Code. Under rule 6 of the same Order, where a suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such delay is claimed. Under section 90(2), the procedure of the Civil Procedure Code is to be applied under such circumstances. It was, therefore, necessary for the applicants to state the cause of delay in the application itself. The Election Commission asked for an explanation, and the applicants gave the cause in their application dated 28th April 1952 (Ex. P. 4). That should have formed part of this petition. However, when it is on record, it cannot be said that the petition and that application together does not show that the reason for the delay has not been shown. It was not incumbent on them to show the date of the cause of action in the sense of the Civil Procedure Code. These are mere irregularities, and such irregularities could be amended, because they do not come under the provisions of either Section 80 or 82 or 83, which expressly make provision about the contents of the election petition. These two points are, therefore, decided in the negative.

55. *Issue No. 9.*—As a matter of fact, these points were not pressed by the respondent. We have considered these points in the beginning of this Order, and it has been found by us that it is not the function of this Tribunal to say what the Election Commission ought to have done. This Election Tribunal will say what it can do and what it should do, under section 90(4) of the Election Act. This Tribunal cannot question the jurisdiction of the Election Commission to appoint this Election Tribunal. The Election Commission has been constituted by the Constitution and its powers have been defined in the Election law in sections 81 to 85. The Election Tribunal which is created by the Election Commission gets all the powers conferred on it by the Election Law. The Election Commission will thus decide questions according to the law under the powers conferred on it and so will the election Tribunal do. The question, therefore, of the Election Tribunal sitting in appeal or revision over the findings of the Election Commission would not arise at all. As a matter of fact the Election Tribunal comes into being because the Election Commission assumes jurisdiction and creates an Election Tribunal. These points in issue No. 9 were not pressed by the respondent No. 1 and rightly so. We, therefore, decide points (a) and (b) in the negative and point (c) in the affirmative.

56. The cumulative effect of all the findings is that the petition fails and is liable to be dismissed.

(Sd.) D. K. SONTAKE, *Chairman.*

AKOLA;

(Sd.) A. S. ATHALYE, *Member.*

The 1st May 1953.

I have been in general agreement with the Order passed by my colleagues on all other issues. Unfortunately, it could not be possible for me to agree with them in their findings on issue No. 5. It is an issue about the valid presentation of the election petition by Shri Walimbe alleged to have been presented on behalf of the petitioners. It was argued by the petitioners that when there was Ex. P-1 signed by them and it was received by Shri Walimbe, the matter had ended and there was a presumption in their favour, and the presumption was proper.

2. A point about the burden of proof was raised by the petitioners in this case. It was argued that the burden lay very heavily on the respondent No. 1 to prove that the petition was not properly presented by a person duly authorized in this behalf by the petitioners, under the provisions of section 114 of the Evidence Act. On the other hand, the respondent No. 1 urges that this particular case is not governed by the provisions of section 114 of the Evidence Act, but by section 106. Section 114 of the Indian Evidence Act runs as follows:—

"The Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case."

3. Now, in this case, Ex. P-1 is the power signed by the petitioners. I have already discussed the evidentiary value of this document, which according to me is not a satisfactory proof. The fact that the power has been signed is clear. It is not dubbed as forged. All the same, what the petitioners have got to prove is that it was signed in favour of the person whose name was not typed, but seems to have been added by whom the applicant is unable to say. This cannot be said to be a common course of natural events. The common course of natural events would be to have all the matter written and then the signature taken. The human conduct referred to in Section 114 is not the conduct of interested persons, but of ordinary human beings and ordinary human being would write the entire matter and then sign it, and would not leave something to be written later. In my opinion, therefore, the provisions of section 114 of the Evidence Act do not apply to this case. The provisions of Section 106 would. The reasons are the following:—

4. The petitioners say that they had decided whom the power should be given. The name was suggested by their own friend. Shri Gole took the power from Akola to Delhi. Under such circumstances, it was within the knowledge of these 3 persons to tell us what had actually happened. But the person proposing the name of Shri Walimbe, or Shri Gole who were in the know of things were not examined, and it is found that the applicant is an unreliable person. Under such circumstances, no inference could be drawn from Section 114, but the burden would lie on the petitioners under section 106 of the Evidence Act. The illustration (g) under section 114 of the Evidence Act is as follows:—

"The evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it"

Here the evidence has actually been withheld.

5. There is a distinction between the presumption of law and the inference from facts. At the most in this case, an inference might be drawn, but no presumption could, because presumption has more sanctity than inference and no inference could be drawn in this particular case, because we find from the evidence of the only witness of the petitioners that he is an unreliable person. The facts which are within the knowledge ought to be disclosed by the person having that knowledge. But apart from what has been said so far, the question of burden of proof becomes immaterial, when we have all the evidence that can be adduced by both the parties before us. When all the circumstances have been ascertained so far as the parties have thought fit to ascertain them, discussion on the point of onus of proof becomes immaterial. The question of onus becomes important if the circumstances are ambiguous. (Vide Sarkar's Evidence Act, page 772, 9th Edition, and the cases referred to thereunder). In this case, I do not find that there is any ambiguity.

6. In my humble view, therefore, when all the evidence is on record and when both parties had an opportunity to give full evidence, the question of burden of proof would not be very material. Now even apart from that, this case would be governed not only by the Evidence Act which governs the manner in which the evidence has to be weighed, but it comes under Article 329(b) of the Constitution. Under that Article—

"No election to either House could be questioned except by an election petition presented to such authority and in such a manner as provided for or under any law by the proper legislature".

Therefore, when an election petition is filed, it is not only incumbent on the petitioners to satisfy only the Election Commission that the mandatory provisions of the Law have been complied with, but they must also satisfy the Election Tribunal which has an independent existence, and which considers, these points notwithstanding anything done by the Election Commission in that behalf, under the provisions of Section 90(4) of the Election Law. It was in my humble view, therefore, necessary for the petitioners to satisfy this Election Tribunal independently about the proper presentation of the Election petition, and the burden under Article 329(b) of the Constitution was on them to prove that fact.

7. I shall now take up issue No. 5 on merits. Ex. P-1 is the alleged authority by the applicants to Shri Walimbe to present the petition at New Delhi. The authority is a type-written one. The heading shows that it was addressed to the Secretary to the Election Commission, Nagpur. But then, "Nagpur" has been scored out and "New Delhi" has been substituted. The type-written matter is:—

"We the undersigned persons making the Election petition in respect of the Election of the Akola Constituency, hereby authorize Shri. to present and deliver the accompanying petition".

It is to be noted that in this power, even when the prefix 'Shri' has been typed, the name has not been typed. The applicant Bhikaji has gone in the witness-box. So says he, in paragraph 6 of his deposition:—

"The legal advisers advised me to file the petition at Delhi. But some persons like Puradupadhye said that Nagpur being the Provincial seat, the petition could be admitted at Nagpur also. Thereupon, after some discussion, all (including the legal advisers) told that the petition be first taken to Nagpur for presentation and then taken to Delhi if required. I then requested Shri Gole to go to Nagpur taking the election petition with him, and after enquiry to present it there, and if it could not be presented there, he should proceed to Delhi."

Further, in paragraph 9 of his deposition, he states:—

"Though the election petition is addressed to the Election Tribunal at Nagpur, my intention was to address it to the Election Commission at Delhi. Majority of my well-wishers told me that most probably the election petition will be admitted at Nagpur, and so accordingly it was addressed to Nagpur."

He further states in paragraph 9, page 3 of his deposition:—

"We did not instruct Shri Gole to present the petition at Nagpur through any particular person. It was left to his choice to do it through a person of his choice. But in respect of Delhi, we had instructed him to set the petition presented through Shri Walimbe. We had definitely instructed Shri Gole to present the petition at Delhi through Shri Walimbe. The words Shri C. G. Walimbe in Ex.-P-1 were already written when I signed the authority. I do not remember who wrote these words. In other forms of authority, this place meant for writing the name of the person was left blank. All the forms of authority were typed at the office of the Advocate Shri S. A. Sohoni. I do not remember whether the words 'Nagpur' or 'Delhi' were written in the forms of authority sent with Shri Gole. There is no reason why ex.-P-1 is not dated. I cannot say whether I dated the other forms. I do not remember whether the typed word 'Nagpur' was substituted by New Delhi in writing before I signed the authority. I do not know who scored the word 'Nagpur' and substituted it by 'New Delhi'. We gave choice to Shri Gole to present the petition at Nagpur, as the names suggested by us were not known to Shri Gole, and the names suggested by him were not known to us."

Then, in paragraph 14 of his deposition, he states:—

"I did not enquire what was done by Shri Gole with the other 4 or 5 forms of authority extra. These forms were handed over to us after the discussion was over".

8. It would thus appear from the evidence of this witness that he had given a specific authority for Shri Walimbe, that the applicant had an idea that the petition was to be presented at New Delhi, and through Shri Walimbe, and that Shri Gole was only to take a chance at Nagpur and then proceed to New Delhi.

9. Ex.-P-14 is a copy of the application sent by the applicants, including this witness, to the Election Commissioner. The witness, A.W. 1 Bhikaji, has stated in paragraph 7 of his deposition:—

"The contents of the application dated 28th April 1952 (Ex.-P-4) are true to my knowledge".

This statement of the witness makes the contents of the application dated 28th April 1952, a substantive evidence in this case. It was argued by the learned counsel for the applicants that the facts mentioned in the application were for the condonation of the delay, and some facts contained in the application were not necessary for the purpose, and therefore, the contents of this document could not be substantive evidence in this case. This ground cannot have any force in the face of the admission of the witness that the contents of that application were true to his knowledge. In this application to the Election Commissioner (Ex.-P-4), the applicants have stated in paragraph 4.—

"They sent the said petition with Shri D. B. Gole senior Advocate of Akola, with a written authority to present the petition in the name of any person of his choice at Nagpur on the 18th April The applicants were under a belief that an officer must have been appointed by the Election Commission under section 81 of the Act, to whom the election petition could be presented for the State of Madhya Pradesh at Nagpur. Accordingly Shri Gole left Akola for Nagpur by the 1 Down Nagpur Mail, reaching Nagpur at 9-30 A.M. on the 18th April 1952."

Then paragraph 5 of this application runs thus:—

"He (Shri Gole) made enquiries about the officer who might have been appointed to receive the election petitions. He consulted R. S. Rangole, who was attached to the Election Office at Nagpur. On enquiry, Shri Gole learnt that there was none at Nagpur who was authorized to receive the election petitions under the Act. Under these circumstances Shri Gole booked a seat in the night plane for Delhi, and reached there on the morning of the 19th. On the 19th, Shri Gole caused the petition to be presented to the Secretary to the Election Commission."

Further on paragraph 6 of the aforesaid application is as follows:—

"The applicants humbly urge that they were under a *bona fide* belief, which they reasonably held, that an Election Officer contemplated by section 81 of the Act must have been appointed by the Election Commission for every State and they therefore felt that it would be possible to present the petition at Nagpur, the capital of the State of Madhya Pradesh. They, therefore, sent the petition with the necessary amount with an Advocate of long standing well within time".

10. It would, thus be clear from the averments in this application that on 28th April 1952, the story of the applicant (A.W. 1 Bhikaji) was different from what the story of the applicant was on 11th April 1953, on which date he was examined. Now it would appear from Ex.-P-4 that the real idea of the applicants was to send Shri Gole with all powers, and he was sent to Nagpur. There is no mention in the application that there was an idea of sending him to Delhi; that the legal advisers of the applicants had advised them to present the application at Delhi, and that they had fixed up the name of the applicants' authorized person. In that case, when the powers were already typed before all this discussion, as told to us by the applicant (A.W. 1), it is very difficult to imagine that the place for writing the name of the person, whose name had already been fixed, had not been typed. The whole story thus appears to be unbelievable. It would appear from the evidence of this witness Bhikaji (A.W. 1) that it is hazardous to rely only on his testimony, especially when his statement in the witness-box contradicts his averment in Ex.-P-4, which he has sworn to be correct even on the 11th of April 1953, on which date he was examined here as a witness.

11. The suspicious nature of Ex.-P.1, coupled with the fact that the evidence of A.W. 1 Bhikaji is unreliable, thus leads me to the conclusion that after all Shri Walimbe was not authorized by the applicants themselves to present the petition at Delhi, when Shri Gole left Akola for Nagpur.

12. It might be argued that such blank powers are generally sent and nobody objects to them. This may be so in practice. But when it comes to actual appreciation of the facts, then we have got to find out whether the provisions of the relevant Law have or have not been complied with. The provisions of section 81(ii) lay down:—

(i) "An election petition shall be deemed to have been presented to the Election Commission when it is delivered to the Secretary to the Commission or to such officer as may be appointed by the Election Commission in this behalf;

(ii) By a person authorized in writing in this behalf by the person making the petition."

Now, it is not proved whether Shri Walimbe was authorized in writing in this behalf by the persons making the petition. This we find from the evidence on record. On the other hand, strict proof of the compliance with the law under section 81(ii) was necessary.

13. It was argued that under section 149 of the Contract Act, a duly appointed agent could validly delegate his powers and thereby make that delegate an agent of the principal directly. In this connection, the facts of the present case do not warrant an inference that Shri Gole was authorized to appoint a delegate. According to the applicants Shri Walimbe's name had already been mentioned in the power (Ex. P. 1), which fact we find has not been proved. But apart from that, when the law lays down that a certain procedure should be followed, it has got to be followed. The law lays down a particular procedure in Section 82(ii), and that has got to be followed. Even under the ordinary law, when the special power is mentioned, the general power available under the ordinary law is withdrawn (*vide Vyankatesh Deshpande Vs. The Crown*, I.L.R. 1940 Nag. page 1 at page 6). In that case, the Provincial Government had released the applicant under the provisions of Section 401 of the Criminal Procedure Code, which was a general power of release. The Order was subsequently withdrawn by the Provincial Government, and it was argued in that case that the authority which could pass the Order could also revoke it, under Section 21 of the General Clauses Act. The learned Judge, on page 6, observed that—

"After looking to sub-section 3 of section 21 of the General Clauses Act, when any condition in which the sentence has been suspended or remitted was not fulfilled then the Governor-General or the State might cancel the suspension or remission. When there was such a provision, the Provincial Government could not cancel the order of remission."

In this case, therefore, when the law definitely lays down that the petition should be presented by a person authorized in writing in this behalf by the applicants, the provisions of that law alone must be fulfilled.

14. The applicants have stated in paragraph 12 of their application as follows:—

"Shri Gole was entrusted with the work in his capacity as a legal adviser when he left with the petition for Nagpur. But he was not authorized to personally present the petition. Shri Gole agreed to do the work in his capacity as legal adviser".

Now, at the most, Shri Gole could be a delegate; and a delegate could not delegate his powers to somebody else. The point can be made further clear like this. If the power is delegated by Shri Gole to Shri Walimbe, then there would be no privity of agreement between Shri Walimbe and the applicants. If Shri Walimbe would not do what was expected of him, he could not, under such circumstances, be liable to the applicants. It is on this ground that the equitable principle that a delegate cannot delegate the authority to somebody else is based. But in this particular case Shri Gole was not a delegate, and according to the applicants, the power was given by them directly to Shri Gole, which is found to be not supported by satisfactory evidence. Under the provisions of Art. 329 read with Art. 327 of the Constitution, we have got to look to the provisions of the law contained in Section 81(ii) and if these provisions are found to be not complied with, then we must come to the conclusion that the presentation of the application was not proper.

15. The Election Commission gives its findings on the material placed before it. The material under the circumstances is bound to be scanty, *viz.* what the applicant chooses to place. The respondent No. 1 who was not then in Akola and who could have no information, could not, therefore, lead any direct evidence. Under such circumstances then, the finding could be based on the material that is placed before it and it is limited to that material only. But it is not unlikely, as is the case in this particular case that there may be circumstances which were not placed before the Commissioner either purposely or negligently, or for any reason whatsoever. And if those facts come before the Election Tribunal as under such circumstances more facts before it than were before the Election Commission. Under such circumstances, to say that the Election Tribunal should only accept the finding of the Election Commission would be to ask the Election Tribunal to refuse to consider certain facts, which are brought before it during investigation. This, no Court of equity would permit, and thus in my humble view, cannot be countenanced by law.

16. While, therefore, the Election Tribunal will try to accept the finding of the Election Commission as far as possible, it must be open to it to consider all the facts that are before it for giving findings on the issues, under rules 81, 83 and 117. That is the reason why this new addition, *viz.*, Section 90(4) has been added to the Election Law.

17. It is possible that all the facts might not be placed before the Election Commission. If those facts were brought to the notice of the Election Commission the Election Commission might sometimes take a different view. There may be a purpose in withholding those facts or there may not be any purpose at all, and if there would be a purpose there would be a fraud in the moral sense of the term. Misrepresentation is defined in Section 18 of the Indian Contract Act. The Section 18, sub-section 2, runs as under—

“Misrepresentation means and includes any breach of duty which without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him.”

18. It would, thus appear that under such circumstances, as is the case here, there may be misrepresentation which may not necessarily be wilful. And if there is such a misrepresentation, then the finding that is based on such misrepresentation, could not be said to be binding on the party which was not present before the Election Commissioner, and whose interests are being affected by that finding. In this particular case the acceptance of the petition has affected the interests of the respondent No. 1, and therefore, he would under such circumstances be entitled to raise these points again in equity and this Tribunal, in my humble view, would not only be entitled but be bound to consider all the facts before it, and give a finding thereon (*vide* Snell's principles of Equity, Chapter III, pages 404, 409 and 410, 13th Edition, 1912).

19. For these reasons, therefore, my findings on the points in Issue No. 5 will be as follows —

(a) (i) It is not a fact that the petitioners had actually authorized Shri Walimbe to present the petition.—

The finding is in the negative.

(ii) It is not quite certain that Shri Gole did it.

(b). In view of the findings on points (a)(i) and (ii), this question would not arise.

(c) For the reasons given above, it could not be said that Shri Gole could legally authorize Shri Walimbe to present the petition.

(d) For the same reasons, the reply to this issue would be in the affirmative.

(e) As I have discussed the evidence above, I find that all the facts were not disclosed to the Election Commissioner. Ex. P-1 *prima facie* showed to the Election Commissioner that Shri Walimbe was authorized by the applicants to present the petition to him. The Election Commissioner, therefore, accepted the petition. But the facts before us clearly show to me that possibly the forms of power were blank when they were sent from Akola, and the facts which are disclosed in the evidence and which we have already discussed above, could not be known to the Election Commission. There could be legal frauds of two kinds—*Suppressio Veri* and *Suggestio Falsi*. If one does not give the whole truth, there is as much a fraud as if one tells a lie. The intensity of those two things may differ. All the same, we are not at present concerned with the question of a criminal offence. The fact remains that the facts that are before me to-day clearly show to me that the alleged power in favour of Shri Walimbe could not have been executed by the applicants. I decide this point in the affirmative.

(Sd.) P. B. SATHE, Member.

Election Tribunal, Akola.

The 1st May, 1953.

ORDER OF THE TRIBUNAL.

DELIVERED THIS 1ST DAY OF MAY 1953.

As a cumulative effect of all the findings on the issues recorded by us the petition is liable to be dismissed and we, therefore, hereby order that it stands dismissed with costs. The petitioners shall pay to the respondent No. 1 his costs of these proceedings. Pleaders fees Rs. 250.

(Sd.) D. K. SONTAKE, Chairman,
Election Tribunal, Akola.

(Sd.) A. S. ATHALYE, Member.

(Sd.) P. B. SATHE, Member.

AKOLA;

The 1st May, 1953.

MEMORANDUM OF COSTS

	Petitioners	Respondents			
		No. 1	No. 2	No. 3	No. 4
	Rs. a. p.	Rs. a. p.	Rs. a. p.	Rs. a. p.	
Stamp for power	2 0 0	2 0 0	1 0 0	1 0 0	..
Pleaders fees	250 0 0	250 0 0	..	..	..
Stamp for petitions and affidavits.	7 0 0	4 0 0	..	..	..
Process fees . . . . .	..	1 8 0	..	..	..
Diet money paid to witnesses .	..	8 0 0	..	..	..
Commission charges . . . . .	..	40 0 0	..	..	..
Total Rs.	250 0 0	305 8 0	1 0 0	1 0 0	..
Disallowed		40 0 0			
		265 8 0			

(Sd.) D. K. SONTAKE, Chairman.

Election Tribunal, Akola.

[No. 19/158/52-Elec.III/7682.]

By Order,

P. R. KRISHNAMURTHY, Asst. Secy.